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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

In the Matter of

CONSOLIDATED ROCK PRODUCTS CO., a Delaware corporation,
Debtor,

UNION ROCK COMPANY, a corporation,
Subsidiary,

and

CONSUMERS ROCK & GRAVEL COMPANY, INC., a corporation,
Subsidiary.

F. B. BADGLEY, COLONEL R. E. FRITH, T. FENTON KNIGHT, and WALTER S. TAYLOR, composing the Union Rock Company Bondholders' Protective Committee; and WM. D. COURTRIGHT, FRED L. DREHER, F. J. GAY and GUY WITTER, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee;
Petitioners,

vs.

E. BLOIS DU BOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioners herein are the members of two bondholders' committees,[1] and were appellees in the Court below. The other appellees below[2] have heretofore filed in this Court their petition for certiorari in this case, being Docket Number 400 in the files thereof. Petitioners pray that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Ninth Circuit entered on June 19, 1940 [R. 365-380, 381][3] adjudging certain features of a proposed plan of reorganization under Section 77B of the Bankruptcy Act unfair and inequitable, and reversing the judgment of the trial court approving said plan.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 19, 1940. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. A. 347(a)) and Section 24 of the Bankruptcy Act (11 U. S. C. A. 47).

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[1]F. B. Badgley, Colonel R. E. Frith, T. Fenton Knight and Walter S. Taylor, composing the Union Rock Company Bondholders' Protective Committee, and Wm. D. Courtright, Fred L. Dreher, F. J. Gay and Guy Witter, composing the Consumers Rock & Gravel Company, Inc. Bondholders' Protective Committee.

[2]Consolidated Rock Products Co., a corporation, and Edward E. Hatch and Louis Van Gelder, composing the Preferred Stockholders' Committee of Consolidated Rock Products Co.

[3]Record references throughout are to the printed record filed with Petition for Certiorari in Docket Number 400.

Statute Involved.

The statute involved is Section 77B (f) of the Bankruptcy Act (11 U. S. C. A. 207f), the pertinent portion of which is as follows:

> "After hearing such objections as may be made to the plan the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *."

Question Presented.

Where there are outstanding two issues of bonds, each secured by a separate mortgage on particular properties and where the two properties have been operated as one for many years, resulting in a commingling thereof, may a reorganization plan, under Section 77B, properly provide for supplanting the bonds of both issues with one issue of bonds secured by all of the mortgaged property formerly securing the respective issues?

Statement of Facts.

The facts found by the Circuit Court of Appeals material to the question involved herein, are as follows [R. 365-380]:

Union Rock Company (hereinafter called "Union"), Consumers Rock & Gravel Company (hereinafter called "Consumers") and Reliance Rock Company (hereinafter called "Reliance") were corporations engaged in the business of mining, processing, shipping and selling rock and

gravel. Union owned all the outstanding stock of Reliance. Union and Consumers had each issued first mortgage bonds secured by certain properties of the respective companies. In 1929, Consolidated Rock Products Co. (hereinafter called "Debtor") was organized. It issued its preferred and common stock to the public for cash. Part of the proceeds was used to acquire all of the outstanding capital stock of Union and Consumers; part was used for operating capital. In the same year Debtor entered into an agreement with Union and Consumers whereby it agreed to operate the properties of said companies and to meet payments of principal and interest on the bonds of said companies. Thereafter, Debtor operated the properties as a unit and in the course of such operations the properties of Union, Consumers and Reliance and replacements of such properties became commingled.

On March 1, 1934, default occurred in the payment of interest due on the Union bonds. On July 1, 1934, a similar default occurred with respect to the Consumers bonds. On May 24, 1935, Debtor, Union and Consumers filed a petition to reorganize under the provisions of Section 77B of the Bankruptcy Act. On April 28, 1937, the petition submitting the plan of reorganization was filed. DuBois, a bondholder, filed objections.

Among other things the plan provided for the organization of a new corporation; the transfer to it of the properties of Union, Reliance, Consolidated and Debtor free of any claims; and the issuance by the new corporation of

new bonds secured by all the property of the corporation. New bonds in the principal amount of $938,500 (being 50% of the principal amount of the outstanding Union bonds) were to go to Union bondholders and new bonds in the principal amount of $568,500 (being 50% of the principal amount of the outstanding Consumers bonds) were to go to Consumers bondholders; new preferred stock was to be issued to both Union and Consumer bondholders; new common stock was to be issued to Debtor's preferred stockholders; new common stock purchase warrants were to be issued to the Debtor's common stockholders.

The plan was referred to a special master. He found that the value of the assets admittedly subject to the Union and Consumers mortgages "is insufficient to pay the par value of the bonds, plus accrued interest." He further found that it was to the bondholders' interest to operate the properties as a unit and recommended approval of the plan of reorganization. The District Court adopted said findings and approved the plan as fair and equitable. DuBois, a bondholder, appealed.

Upon appeal, the Circuit Court of Appeals, saying that it was acting upon the authority of *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, adjudged unfair two provisions of the proposed plan:

(1) The provision for the issuance of a single issue of bonds secured by the properties of Union, Reliance, Consumers and the Debtor.

(2) The provision for the issuance of common stock to the preferred stockholders.

The court found it unnecessary to consider other provisions of the plan, held the plan unfair and reversed the judgment of the trial court approving the plan.

This petition is filed for the purpose of seeking a review of adjudication (1) above, not for the purpose of seeking a review of adjudication (2).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred in adjudging that even though the mortgaged properties of two corporations have been commingled and operated for years as a unit, a plan of reorganization is unfair if it provides for one issue of bonds, issued in such amounts to the bondholders of the respective corporations as would give them security equivalent to the security they would have had if the plan had provided for two issues of bonds each secured by the properties of each respective company.

Reasons for Granting the Writ.

The Circuit Court of Appeals has decided an important question of law which has not been but should be settled by this Court.

In many ventures of magnitude, notably in the case of railroads, properties subject to one mortgage become intermingled with properties subject to other mortgages and all of such properties over a period of many years, are operated as a unit. Reorganization of such properties, beneficial to the bondholders, often cannot be effected unless a single issue of bonds replaces the numerous ones

theretofore existing. The decision of the Circuit Court of Appeals erroneously, as we contend, would make impossible plans of reorganization embracing such procedure. This question is not considered in *Case v. Los Angeles Lumber Products Co.* (*supra*) and has not been settled.

The settlement of this question is important to petitioners. So long as the adjudication of the Circuit Court of Appeals stands, it will be impossible to secure approval by the trial court of a plan which provides for a single issue of bonds. Such a plan may be the only practicable way to reorganize these corporations. To propose a plan in the teeth of said adjudication, in the hope that this Court might ultimately review a decision rejecting it will be impractical in view of the inevitable expense of working out the plan and delays incident thereto and to the appeals which would have to be prosecuted.

The settlement of the question is important to bondholders and corporations wherever several corporations (parents or subsidiaries, or both) have respectively issued bonds and desire to reorganize under the Bankruptcy Act as one consolidated corporation, issuing one issue of bonds to replace the several respective issues of the constituent corporations, or wherever one corporation, which has operated its entire properties as a unit, has two or more bond issues outstanding, each secured by a different part of its properties.

Argument.

In adjudging unfair the provision for the single issue of bonds to replace the bonds issued by Union and Consumers, the Circuit Court of Appeals said:

> "It is obvious that the plan here is condemned by these rules. The trial court found that the property of Union covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Union, yet the Union bondholders are deprived of their right to full priority against Union's assets, since Consumers' bondholders and debtor's preferred stockholders are given an interest in Union's property. Likewise, the trial court found that the property of Consumers covered by the trust indenture was insufficient to pay the principal and accrued interest of the bonds issued by Consumers, yet Consumers' bondholders are deprived of their right to full priority against Consumers' assets, since Union bondholders and debtor's preferred stockholders are given an interest in Consumers' property. Exactly in point, as to facts, is Case v. Los Angeles Lumber Co., *supra*. Since the order must be reversed on the ground that the bondholders have not been accorded full priority, it is unnecessary to discuss other charges of unfairness in the plan, some of which appear to be sound." [R. 377.]

We do not in this petition attack the correctness of the conclusion that in view of *Case v. Los Angeles Lumber Products Co.* (*supra*), the Debtor's preferred stockholders are not entitled to any interest in the properties. We ad-

dress ourselves to the decision that it is improper to issue one issue of bonds secured by both Union and Consumers properties (and also by properties of Debtor) and divide the bonds equitably between Union and Consumers bondholders.

In many cases feasibility may require that unified operations be continued and that creditors secured by different parts of a unified system shall receive identical securities. In such cases, each class of lienholders may be compensated for the loss of its exclusive lien by the acquisition of a partial interest in other property. There is nothing in *Case v. Los Angeles Lumber Co.* which supports the decision of the Circuit Court of Appeals that this cannot be done. That case dealt with a single issue of bonds, all secured by the same property, and did not involve two issues secured by different properties. A frequent feature of railroad reorganizations is the elimination of divisional mortgages by substituting a new security issuable to the holders of the several divisional bond issues. Unless the decision of the Circuit Court of Appeals on this matter is reversed, it may seriously interfere with railroad as well as with other reorganizations.

As an instance of this practice in railroad reorganizations, the attention of the Court is directed to the case of *Jameson v. Guaranty Trust Co. of New York,* 20 Fed. (2d) 808 (C. C. A. 7th, 1927), certiorari denied 275 U. S. 569 (1927). The reorganization plan there proposed in an equity receivership provided that the holders of two outstanding bond issues, each of which was secured by a par-

ticular portion of the company's property, should parti
pate equally in two new bond issues, a first and a secon
both secured by mortgages covering all of the property
which the old issues had previously been separately s
cured. The order of the District Court approving t
plan was affirmed by the Circuit Court of Appeals over t
objection that the plan discriminated unfairly in favor
the holders of one of the old bond issues.

More recently, acting under Section 77 of the Ban
ruptcy Act (11 U. S. C. A. §205), the Interstate Co
merce Commission has approved two plans of reorganiz
tion for railroads in which divisional liens were eliminat
and the lienors were given general system securities of t
same class in lieu thereof. *Missouri Pacific Reorgani
tion,* 239 I. C. C. 7 (Jan. 10, 1940, modified on a differe
point, April 9, 1940); *Chicago & Northwestern Reorga
zation,* 236 I. C. C. 575 (Dec. 12, 1939). It should
noted that the Commission may approve a plan only if
the Commission's opinion it

> "is fair and equitable, affords due recognition to t
> rights of each class of creditors and stockholde
> does not discriminate unfairly in favor of any cl
> of creditors or stockholders, and will conform to t
> requirements of the law of the land regarding
> participation of the various classes of creditors a
> stockholders,"

as required by subdivision (e) of Section 77. It shou
be noted, moreover, that both reports were rendered af
the decision of this Court in *Case v. Los Angeles Lum
Co.*

Where unified operations are desirable, or where the respective assets securing two or more bond issues have been intermingled, a reorganization plan under Section 77B may properly provide for supplanting the bonds separately secured with new securities which are general in character. For example, in the 77B reorganization involved in *In re United Railways & Electric Co.*, 11 Fed. Supp. 717 (D. C. Md., 1935), nine different mortgages with their respective securities (most of which were divisional bonds) were supplanted by the issue of debentures and preferred stock, the Court stating (at p. 720):

> "There had been outstanding for many years 12 issues of securities, constituting the capitalization of the company. Of these, five were divisional bonds, and two were Maryland Electric Company bonds, which were substantially divisional bonds. Each one of these divisional bonds covered a railway which was originally an independent unit, a self-contained railway, but through the later consolidations this independent character was completely destroyed. The identity of the respective assets of each railway became lost and, therefore, it became absolutely essential to disregard the various divisions in the present reorganization, in so far as different securities were concerned, and simply to proportion, as nearly as possible, the actual values that now adhere to the respective parts, as represented by the old securities. Thus, under the reorganization, nine different mortgages with their respective securities have been supplanted by the issue of (1) debentures and (2) preferred stock."

Conclusion.

The question here raised is one of great public importance. So long as the holders of bonds of each of several issues are given bonds of a single issue, secured by all of the properties securing the respective original issues, in such amounts as give these bondholders the equivalent of their right to full priority against the assets securing their old bonds, there is nothing inherently unfair in a plan which so provides. The adjudication of the Circuit Court of Appeals condemns such plans of reorganization. It is respectfully submitted that this petition to review the judgment of the Circuit Court of Appeals for the Ninth Circuit should be granted.

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